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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

Case No. [redacted] 131

ACCELERATED TRANSPORT-PONY EXPRESS INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
Background and Nature of the Proceeding	2
The Questions Presented	10
Question No. 1	10
Question No. 2	11
Question No. 3	12
Preference	12
Conclusion	14
Certificate of Service	16

CASES CITED

Class Rates Between Middle Atlantic and New England Territories, 67 M.C.C. 741	3, 4
General Increases-Middle Atlantic and New England, 319 I.C.C. 168	7
Increases-Middle Atlantic and New England, 49 M.C.C. 357	2
Patterson v. L. & M., 269 U. S. 1	12

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

Case No. 1163.

ACCELERATED TRANSPORT-PONY EXPRESS INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

The appellee, Lynchburg Traffic Bureau, is a party to this appeal by virtue of having been permitted to intervene in the proceeding before the United States District Court for the District of Vermont by order of said Court.

This appellee hereby moves that the judgment of such District Court be affirmed.

BACKGROUND AND NATURE OF THE PROCEEDING

The pertinent facts as they appear from the report of the Commission and the opinion of the District Court reproduced as Appendices A and B to the Jurisdictional Statement are so clearly set forth in such report and opinion that they need no extensive recital here.

These appellants, since 1949, have maintained from and to points in Middle Atlantic and New England Territories higher rates at Lynchburg, Virginia, a border point, than the same appellants maintain to more distant points located beyond the border point, Lynchburg. This proposition was brought to the attention of the Commission in 1948 and in its decision in 1949, the Commission, in Increases-Middle Atlantic and New England 49 M.C.C. 357 at page 386, had this to say:

> "The Lynchburg, Va., Traffic Bureau takes the position that the proposed rates are not reasonable or just, and that the record fails to warrant any increase in the present rates. It is stated that any increase in the present rates would only further increase the disparity in the rates now existing at border points between trunk-line territory and southern territory. For example, the present first-class rate on shipments weighing less than 2,000 pounds, between Lynchburg and Baltimore, Md., is $1.35 and the proposed rate $1.49, as compared with the present first-class rate of $1.44 on commodities subject to the classification exceptions ratings, and $1.32 on commodities subject to the classification ratings between Danville, Va., and Baltimore, although the

distance from Danville is 64 miles greater than from Lynchburg to Baltimore. Numerous other border-line disparities are shown. General intraterritorial increases in rates usually result in disparities at border points. *The respondents should take prompt action to eliminate such disparities.*" (Emphasis supplied).

The quotation from the above decisions shows: (a) that higher rates at Lynchburg were applied on shipments moving from Baltimore than appellants applied on the same shipments moving to Danville, Virginia; (b) that Danville is 64 miles south of Lynchburg; and (c) that these appellants were admonished to take prompt action to eliminate rates which are higher at Lynchburg than those to more distant points.

These appellants did not voluntarily make the corrections they were admonished in 1949 to make and in this proceeding, the Commission has ordered these appellants to establish rates at Lynchburg which do not exceed the rates to more distant points. The record in Class Rates Between Middle Atlantic and New England Territories, 67 M.C.C. 741, shows that in 1955 the same problem was present. The Commission, at page 761 of 67 M.C.C. 741 described the condition as follows:

"Between Lynchburg and New York City, 401 miles, the rates on shipments weighing less than 2,000 pounds range from $2.92 on Class 100 to $1.81 on Class 55. The corresponding rates between New York City and Gretna, Va., 425 miles, range from $2.71 to $1.60. Gretna is almost directly south of Lynchburg. Both are on U.S. Highway 29. The example given is said to be illustrative of similar maladjustments at

other points on the border between the two territories. *"The respondents made no defense of such situations.* Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate discrimination similar to that above described." (Emphasis added)

This decision shows; (1) that higher class rates are maintained at Lynchburg, Virginia than maintained to Gretna, Virginia; (2) that Gretna is 24 miles almost directly south of Lynchburg; (3) that appellants made no defense to charging higher rates at Lynchburg than at Gretna; (4) that the Commission instructed the appellants to eliminate all rate discrimination of charging higher rates at Lynchburg than at Gretna; and (5) that the Commission found that higher class rates for lesser distances over the same route are clearly unjust and unreasonable. It is important to observe, since appellants have raised questions about preference and prejudice, that the Commission did not find that higher rates for lesser distances created undue preference and prejudice but rather found that such higher rates were unjust and unreasonable.

In the above proceeding reported at 67 M.C.C. 741, these appellants agreed to be bound by the decision the Commission rendered therein and by that agreement they were to eliminate rates at border points which were higher than to more distant points. This agreement is found in Class Rates Between Middle Atlantic and New England Territories, 67 M.C.C. 741, where at page 748 is found the following:

"(Footnote) *Effective August 18, 1955, schedules

> increasing the arbitraries to 45 and 20 cents were permitted to become effective, although protested; respondents, however, agreed to be bound by the decision in these proceedings . . ."

Had these appellants complied with their agreement and the decision of the Commission there would be no cause for this appeal. Hence, this appeal is the direct result of a breach of an agreement by appellants and the failure to comply with a decision of the Commission holding prior to 1949 and subsequent thereto that higher rates for lesser distances over the same route are unjust and unreasonable. This agreement itself is sufficient, without more, to sustain the motion to affirm and justify granting the motion.

These appellants had an opportunity in 1955 to justify the disparities and to rebut the presumption that higher rates for lesser distances are unjust and unreasonable if they could do so, but they offered no defense to maintaining higher rates at border points than at more distant points. In Class Rates Between Middle Atlantic and New England Territories supra, it is shown that these appellants were given an opportunity to rebut the presumption that higher rates for lesser distances are prima facie unreasonable. The report at page 748 shows:

> "When the respondents proposed the intraterritorial class rates, in lieu of reducing the arbitraries, which were the same as those just described in connection with the interterritorial class rates prior to December 7, 1953, they increased them to 45 cents, maximum 50 percent of the rate, on shipments weighing less than 2,000 pounds, and to 20 cents, maximum 20 percent of the rate, on shipments weighing 2,000 pounds and less

than 6,000 pounds. The increases were made on the ground that the former arbitraries were too low to compensate the carriers for the additional expenses, over and above the basic rates, incurred in transporting the so-called small shipments. *The respondents then sought by petition to increase the interterritorial arbitraries to the same amounts and to broaden the issues in No. MC-C-1600 accordingly. The petition was denied on the ground that the respondents were at liberty to offer evidence justifying any bases of arbitraries they deemed reasonable.* Their evidence was directed chiefly to showing the necessity for, and the lawfulness of, the increased arbitraries proposed in No. MC-C-1600.'" (Emphasis added)

The above quotation from the decision in the Class Rates Between Middle Atlantic and New England Territories case, supra shows (a) that the disruption between the class rates to Middle Atlantic and New England Territories and between points in these territories and points in southern territory were the creation of appellants by establishing higher arbitraries on shipments weighing less than 6,000 pounds moving between points in Middle Atlantic and New England territories from the arbitraries appellants maintain from points in Middle Atlantic and New England territories to points south of the border; (b) that the Commission denied their petition to bring in issue the interterritorial rates in cases 67 M.C.C. 741; (c) that the appellants were given an opportunity in 1955 to rebut the presumption that higher rates for lesser distances are unjust and unreasonable; and (d) that the appellants made no effort to rebut the aforesaid presumption of unreasonableness.

The Commission in 1960 in Lynchburg Traffic Bureau v.

Smith's Transfer, 310 I.C.C. 503, had before it the charging of higher rates for lesser distances and in that decision at page 506 said:

> "Repeatedly the Commission has found that such rate adjustments are prima facie unjust and unreasonable."

The above outline brings us to this proceeding known as Docket 33652 before the Commission, Civil Action 3883 before the District Court for the District of Vermont and Case No. 1163 before this Court.

In this proceeding as it has been since 1949, the appellants maintain higher rates at intermediate points for lesser distances than to more distant points. The Commission in General Increases-Middle Atlantic and New England, 319 I.C.C. 168, commented at page 177 as follows:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points."

The above quotation clearly shows (1) that the disparities in rates at the border points exists in 1963 although these appellants were admonished in 1949 to eliminate such rate disparities at border points; (2) that appellants not withstanding the fact that rates to points beyond the border points were not in issue, yet these appellants sought to get the Commission to hold the rates to and from the border

points as minimum rates to and from the more distant points; and (3) that the appellants are powerless to correct the said rate situation at border points. In view of the action of appellants, as above set forth, they are estopped now to claim that the District Court or the Commission made an error in requiring them to maintain at border points no higher rates than they maintain through the border points to points beyond the border.

The report in the General Increases-Middle Atlantic and New England case 319 I.C.C. 168, deals further with the border situation; where at page 177, the following is found:

> "With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. TO THE EXTENT THAT SUCH MALADJUSTMENTS OCCUR, THE INCREASED RATES ARE UNJUST AND UNREASONABLE." (Emphasis added)

In this quotation, the Commission finds; (a) that the resulting higher rates (the addition of the arbitraries of 30 cents and 10 cents to the rates) to and from the border points are unlawful; (b) that the appellants, if they desire to participate in the rates from and to points in Middle Atlantic and New England Territories and points beyond the border, that they should arrange to maintain no higher rates at intermediate points; and (c) that the increased rates are unjust and unreasonable when applied at border points.

It may be appropriate, at this time, to clarify what rates were involved before the Commission in this proceeding. This proceeding is an investigation instituted by order of January 13, 1961, into the lawfulness of general increases in motor common carrier class and commodity rates published to become effective January 16, 1961. The rates applying on less-than-truckload quantities weighing under 2,000 pounds, 2,000 to 5,999 pounds, and 6,000 pounds and over, were increased 30 cents per 100 pounds on shipments weighing under 2,000 pounds, 10 cents per 100 pounds on shipments weighing 2,000 to 5,999 pounds, and 3 cents per 100 pounds on shipments weighing 6,000 pounds and over (319 I.C.C. 168 (169)). The physical application of the increases means that the basic rate on the article shipped, whatever it may be, is increased by 30 cents per 100 pounds on a shipment weighing under 2,000 pounds, by 10 cents per 100 pounds on shipments weighing 2,000 to 5,999 pounds and 3 cents per 100 pounds on shipments weighing 6,000 pounds and over.

The Commission found in this proceeding that when the increases which they suggested for application in the area considered results in higher rates to border or intermediate points than to more distant points, that such higher rates are unjust and unreasonable at the border points to the extent that the rates exceed the rate to a more distant point.

The Commission in this proceeding at page 177 of 319 I.C.C. 168, stated:

> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former

> are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered . . .

In this proceeding, the Commission found: (1) the arbitraries unjust and unreasonable when applied to the rates to and from border points in instances where the rate to the border point or intermediate points is higher than the rate to the more distant point; (2) that the schedules, containing the arbitraries, made effective January 16, 1961, were ordered cancelled; and (3) appellants could make an amendment so as to provide for the application of the lower rates to more distant points as maxima at intermediate border points.

THE QUESTIONS PRESENTED

Appellants have set forth three questions in which the question is asked: Did the District Court err in answering in the affirmative the questions presented? The Court made no error.

QUESTION NO. 1

The difficulty with appellants' position is that the Commission did not find on the record as appellants claim the Commission did, that the increased rates are at a just and reasonable level and properly related to one another. The Commission, as the report shows at page 177, 319 I.C.C. 168, simply found that the arbitraries of 30 cents and 10

cents and 3 cents were just and reasonable between all points *except* that the arbitraries of 30 cents, 10 cents, and 3 cents were not just and reasonable when applied to the rates to and from border points to the extent the resulting rates were greater to those points than the rates to a more distant point. The unlawful rates of which the Commission spoke were the rates appellants sought to establish at border points and not the rates to points beyond the border. It was the duty of appellants to rebut the presumption that higher rates for lesser distances are unjust and unreasonable and failing to rebut that presumption did not give appellants a right, legal or moral, to challenge the report and order of the Commission for their failure to produce evidence, if they could, that the rates to the border points were reasonable and just. The District Court made no error in affirming the report and order of the Commission.

QUESTION NO. 2

The mere fact that a rate is higher for a shorter distance than for a longer distance raises immediately, in law, the presumption that the higher rate is unreasonable (Patterson v. L & N 269 U.S. 1(11)), and that presumption is raised regardless of the territories in which it exists. Such higher rates do not create undue preference and prejudice without evidence showing such preference and prejudice. In other words, something is wrong when Brooks Transportation Company or Associated Transport, Inc. will charge a rate to Lynchburg of 381 cents for 400 to 420 miles from points in Middle Atlantic Territory and only charge 362 cents through Lynchburg to Gretna for a distance of 420 to 440 miles from points in the same Middle Atlantic Territory. The rate for 400 to 420 miles, before the addition of 30 cents is 351 cents per 100 pounds and

the rate through Lynchburg to Gretna for 420 to 440 miles is 362 cents. In other words, the addition of the arbitrary to the rate to the border points is the cause for higher rates at Lynchburg than to Gretna, as the rate without the arbitrary is less at intermediate points than to more distant points. The Commission found the arbitraries unjust and unreasonable when applied at intermediate points because the arbitraries created the higher rates at intermediate points.

QUESTION NO. 3

The District Court did not in holding that if appellants chose to participate in lower rates to more distant points that such lower rates should be held as maxima at intermediate points. This holding is supported by the decision in Patterson v. L & N 269 U.S. 1. It is the statutory duty of the Commission not to permit the publication of rates which violate any provision of the law. Here the higher rates at intermediate points did violate the Act and many decisions of the Commission holding such rates, as those involved in this proceeding, to be unreasonable. These decisions were made by the Commission in the discharge of its statutory duty and they are supported by substantial evidence.

PREFERENCE

The issue in this case was the lawfulness of the arbitraries of 30 cents, 10 cents, and 3 cents depending upon the weight of each shipment and not the level of the rates. The issue of preference and prejudice was not involved in this proceeding. The report of the Commission shows that the proposed increases were flat amounts to be added to the rates on less-truckload quantities of under 2,000 pounds.

2,000 to 5,999 pounds, and 6,000 pounds and over, and the proposed increases were for 100 miles and over 30 cents, 10 cents, and 3 cents respectively (Jur. S. 16a). In the report the Commission stated that the increased rates are unjust and unreasonable to the extent that they result in higher rates at intermediate points than to more distant points (Jur. S. 28a). The record, therefore, shows that the District Court was correct in holding that the Commission did not purport to find that the rates resulted in undue preference or prejudice and that such a finding was not necessary for the decision reached or to the validity of the order (Jur. S. 10).

Section 216(d) of the Act requires above everything else that all rates must be just and reasonable and that every unjust and unreasonable rate is declared to be unlawful. Hence, the proposed rates to the border being higher for shorter distances than for longer distances are unjust and unreasonable as a matter of law as this Court has held that aside from statutory enactment it is prima facie unreasonable to charge more for a shorter haul than for a longer haul (See Patterson v. L. & N 269 U.S. 1(11)). These appellants have had over 15 years in which to justify charging more for a shorter haul than for a longer distance and they have never rebutted the presumption that the higher rates at intermediate points are unreasonable. Hence, there is no valid grounds on which these appellants can attack the decision of the District Court or of the Commission. In view of the above and since it is not the function of the Court to pass upon the measure of rates or to set aside an order of the Commission unless the order is not supported by substantial evidence, there is no merit to the appeal of appellants. There is no evidence of record showing that higher rates at intermediate points than to more distant

points are reasonable and just at the intermediate points, but there is abundant evidence of record showing such higher rates to be unjust and unreasonable. The District Court was correct in affirming the report and order of the Commission. There is no merit to the position of appellants and the motion to affirm should be granted.

CONCLUSION.

Appellee, Lynchburg Traffic Bureau, could answer each challenge appellants made or can make against the order of the District Court and the report and order of the Commission. However, this appellee sees no reason to further show that there is no merit to the petition of appellants. The short answers are: (1) that these appellants have been given an opportunity to justify the maintenance of higher rates at intermediate points than to more distant points during the past 15 years (49 M.C.C. 357 in 1949 to 319 I.C.C. 168 in 1963 including 67 M.C.C. 741 in 1956), but appellants rather than to justify, if they could, the unlawful rates, contend that they are powerless to do anything about it (319 I.C.C. 168, Jur. S. 24a). The decision of the Court in Patterson v. L & N 268 U.S. 1 declares the higher rates for lesser distances are prima facie unreasonable and that finding requires the appellants to justify such higher rates otherwise to apply no higher rate at intermediate points than the rate to the point beyond the intermediate point. Hence, since appellants are unable to rebut the presumption of unreasonableness, the motion to affirm should be granted as appellants claim they are powerless to correct this condition; and (2) these appellants are barred and estopped from contending that the report and order of the Commission and of the District Court are erroneous. In 1955 these appellants informed the Commission and members of the

public including this appellee that they agreed to be bound by the decision of the Commission in Docket MC-C-1600, 67 M.C.C. 741 (748) and in that case the decision of the Commission was that higher rates for lesser distances over the same route are clearly unjust and unreasonable and the Commission further stated that they expected the appellants to eliminate all such rate disparities when appellants published the rates the Commission suggested that appellants may publish (67 M.C.C. 741, p. 748 and 761, Class Rates Between Middle Atlantic and New England Territories). The appellants did publish the arbitraries the Commission suggested and that acceptance and publication barred the appellants to the obligation of removing the higher rates at intermediate points, even without an order. The order in this case is justified by the record here and the agreement of appellants made in 67 M.C.C. 741. The motion should be granted.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

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June 27, 1964

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Appellee, hereby certify that I have this 27th day of June, 1964, served a copy of the foregoing document upon the Appellants by mailing a copy thereof to:

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